PREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

MAR 6 1968
JOHN F. DAVIS, CLERK

ALAN McSURELY, MARGARET McSURELY, SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., THE NATIONAL CONFERENCE FOR NEW POLITICS, and VIETNAM SUMMER, *Appellants,*

and

JOSEPH MULLOY, *Intervenor,*

—against—

THOMAS B. RATLIFF, Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky; PERRY A. JUSTICE, Sheriff of Pike County, Kentucky; GROVER ATKINS, Jailer of Pike County, Kentucky; and ROBERT L. MATTHEWS, Attorney General for the Commonwealth of Kentucky, *Appellees*

and

UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE DIVISION

REPLY TO MOTION TO DISMISS

DAN JACK COMBS,
207 Carolina Avenue,
Pikeville, Kentucky.

ARTHUR KINOY,
WILLIAM B. KUNSTLER,
511 Fifth Avenue,
New York, New York, 10017.

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey, 07102.

Attorneys for Appellants.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

ALAN McSURELY, MARGARET McSURELY, SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., THE NATIONAL CONFERENCE FOR NEW POLITICS, and VIETNAM SUMMER, *Appellants,*

and

JOSEPH MULLOY, *Intervenor,*

—against—

THOMAS B. RATLIFF, Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky; PERRY A. JUSTICE, Sheriff of Pike County, Kentucky; GROVER ATKINS, Jailer of Pike County, Kentucky; and ROBERT L. MATTHEWS, Attorney General for the Commonwealth of Kentucky, *Appellees*

and

UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE DIVISION

REPLY TO MOTION TO DISMISS

1. The Government now takes the position that this Court does not have jurisdiction to hear this appeal under 28 U.S.C. § 1253 because the three-judge court should not

have heard the matter as to the subpoenas. We observe at the outset that this is a radical change of position on the part of the Government.

We call the Court's attention to the Solicitor General's first submission in this case. In his memorandum in response to appellants' application for emergency relief filed on November 2, 1967, the Solicitor General stated the following:

> "In light of the above we suggest the following disposition which is designed to protect the vital interests of the committee and at the same time to afford applicants the opportunity to present promptly to the district court whatever defenses they believe they have to offer: that the Circuit Justice enter an order directing (1) that the seized documents be retained by their present custodian or by the clerk of the district court pending further proceedings in that court; (2) that this relief be conditioned upon the applicants filing in the district court within five days of the Circuit Justice's order any and all objections which they have to the validity of the subpoena; and (3) that this order shall remain effective until further order of the district court ruling upon such objections."

It will be noted that there was no hint at the time that the "District Court" was anything other than the then sitting three-judge court. Moreover, subsequently, on November 24, 1967, the Government formally moved to intervene before this very same three-judge court (appendix to jurisdictional statement, 98a). And even in its response to appellants' second application for emergency relief the Government stated, "We assume, for present purposes, that appeal lies directly to this Court." (Footnote 1.)

We do not mean to suggest that jurisdiction can be conferred on the Court by the Solicitor General; we do, however, point out that his position now is contrary to his earlier actions.

2. The Government rests its contention that there is no jurisdiction upon *Commission* v. *Brashear Lines*, 312 U. S. 621. That case is clearly distinguishable:

a) In *Brashear* the duties of the three-judge court "had been fully performed" before it was presented with the issue of damages. That is hardly the case here. In the instant case the District Court at the time it was confronted with the subpoena still had pending before it the issue with which it was originally presented, i.e., the return of the documents. Thus it had not "fully performed" its three-judge court duties.

b) In *Brashear* the court emphasized the wide gulf between the injunctive relief to which 28 U.S.C. §2281 is addressed and a claim for damages. But the relief sought here—the return of the documents—has from the very first application for judicial relief as set forth in the complaint, called for invocation of the injunctive power of the court (jurisdictional statement, appendix F-133a) and the motion upon which the lower court was asked to act (*ibid.*, appendices D-1 and D-6, 6a to 9a) likewise sought injunctive relief.

3. The Government suggests that the present proceeding is "in any real sense completely independent of the original action" and on that basis it would distinguish the *Bibb County* case, 389 U. S. 215. It argues that in *Bibb* the issue remained "ancillary" to the original basis for convening the three-judge court "since it was necessary to accomplish the essential purpose for which the court had been convened" (Government's motion to dismiss, p. 7). The Gov-

ernment then in effect argues that the present issue is really entirely separate from and wholly unrelated to the basis of the original proceeding.

That is hardly the case. One of the main issues to be presented on the appeal is whether, regardless of its form and content, any subpoena is effectively servable upon a court officer holding documents which have been judicially determined to have been illegally seized (jurisdictional statement p. 20). This issue has to do directly with the enforcement of the State statute and the consequent illegal seizure thereunder. This is not a "discreet" issue separate and apart from the seizure; this is indeed a specific consequence of the seizure. Appellants on this point contend very simply that there is only one possible consequence of an illegal seizure and that is a return of the documents to their rightful owners.

So, too, the issue of whether a subpoena composed on the basis of information obtained from unauthorized inspection of illegally seized documents permitted by the very parties who committed the illegal seizure. This again involves the consequences of conduct by officers who illegally seized documents.

In short, on these issues, at least, the contending parties remain, as they always have been the appellants and the State officials of Kentucky, and the form and content of the subpoena or the powers of the McClellan Committee are quite irrelevant. And indeed, exactly as in *Bibb*, the relief sought here is "clearly ancillary to the proceedings against the State officials since it was necessary to accomplish the essential purpose for which the court had been convened" (to borrow the Government's own language, motion to dismiss, p. 7), i.e., to enjoin the prosecution and obtain the return of the documents.

4. Finally, we suggest that the Solicitor General has proposed a far too limited scope for the application of Rule 20 of the Rules of the Court. While doubtless the Rule has been applied in extraordinary cases such as *Youngstown Co.* v. *Sawyer,* 343 U. S. 579, and *United States* v. *United Mine Workers,* 330 U. S. 258, it has also been applied in cases of somewhat less dramatic importance where other considerations have suggested that the Court exercise its undoubted power to grant *certiorari* before the judgment of the Circuit Court. Thus, both *Stainbeck* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, and *Turner* v. *City of Memphis,* 369 U. S. 350, involved cases which were certainly not of extraordinary importance if measured against *Youngstown* and *United Mine Workers,* but nevertheless the Court exercised the discretion here sought to be invoked. The considerations applicable here may be stated as follows:

a) There is no question of the importance of the issues; even the Solicitor General assumes that the decision of the Court to grant the stay implies a determination that the questions are substantial.

b) There is no question that the issues are of sufficient novelty as to call for ultimate determination by this Court, and it does not appear that any prior consideration of the case by a Circuit Court will serve further to clarify the issues.

c) The case does present unusual problems of the relationship between the functioning of a Senate Committee and State officials, the speedy determination of which would seem to be at least as important as the Court must have felt was called for in *Wilson* v. *Girard,* 354 U. S. 524, where the Court did not wish to delay a determination of jurisdiction to try American soldiers stationed in Japan.

In his first submission to the Court the Solicitor General emphasized the need for speed: "We stress at the outset that the Senate Committee regards it as highly important to the conduct of its investigation that the papers in question be made available to it without delay."

d) Probably more so than any other case in which the Court has even considered exercising its Rule 20 power, this Court has already dealt extensively with the factual and legal issues—upon the two applications for a stay—so that economy of judicial effort clearly calls for this Court's hearing this case at this time.

e) Even the Government would have to concede that the issue under 28 U.S.C. §1253 is, to say the least, abtruse and not likely to recur. If the Court finds it appropriate not to adjudicate that question, the avenue through Rule 20 permits an efficient method of considering the substantive issues in the case without making it necessary to determine the 28 U.S.C. § 1253 question.

Respectfully submitted,

DAN JACK COMBS,
207 Carolina Avenue,
Pikeville, Kentucky.

ARTHUR KINOY,
WILLIAM B. KUNSTLER,
511 Fifth Avenue,
New York, New York, 10017.

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey, 07102.

Attorneys for Appellants.